

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002487-WC

MANALAPAN MINING COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-98-00070

JIMMIE DARRELL FRAZIER;
ROBERT WHITTAKER,
Director of Special Fund;
W. BRUCE COWDEN, JR.,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

*** **

BEFORE: HUDDLESTON, KNOPF and MILLER, Judges.

HUDDLESTON, Judge: On October 14, 1996, Jimmie Darrell Frazier, a 58-year-old high school graduate who had been employed in the coal mining industry for some 26 years, injured his back while working for Manalapan Mining Company, Inc. (MMC). He underwent physical therapy for two months. Although he continued to experience back pain, Frazier returned to full duty earning the same wage as before his injury. On April 24, 1997, Frazier again injured his back.

After the second injury Frazier underwent a lumbar laminectomy and a diskectomy. He has not returned to work.

On January 5, 1998, Frazier filed an application for resolution of injury claim seeking workers' compensation benefits as a result of both work-related traumatic events. An Administrative Law Judge awarded Frazier temporary total disability benefits from October 15, 1996, through November 24, 1996, and 13.33% permanent partial disability (PPD) benefits beginning November 25, 1996, and continuing for 425 weeks. This award was apportioned equally between the Special Fund and MMC. The ALJ found that as a result of the 1996 and 1997 injuries, Frazier is totally and permanently occupationally disabled. He attributed 13.33% of Frazier's occupational disability to the 1996 injury and the remainder, 86.67%, to the 1997 injury. The ALJ held the Special Fund liable for one-half of the benefits payable as a result of the 1996 injury, that is one-half of 13.33%, for so long as Frazier is disabled.

The Workers' Compensation Board affirmed the ALJ's award in all respects save one. It determined that "the Special Fund has no obligation beyond its liability for any injuries resulting in overlapping PPD awards that occurred prior to the enactment of the 1996 [Workers' Compensation] Act."

MMC petitions for review of the Board's decision claiming that the ALJ erred or exceeded his powers in finding that Frazier is 100% occupationally disabled and that the Board erred in affirming the ALJ's finding. MMC also argues that the ALJ correctly apportioned one-half of the 13.33% disability award to

the Special Fund for so long as Frazier is disabled and that the Board erred in holding that where the injury culminating in total disability occurred after the effective date of the 1996 amendments to the Workers' Compensation Act, after the expiration of the overlapping period of compensability for the prior PPD award, the original overlapping dollar amount will become the liability of MMC for so long as Frazier is disabled.

Frazier responds that we should affirm the 100% occupational disability award and the Special Fund insists that the Board correctly placed a time limit on its liability for the payment of benefits. Initially, however, Frazier argues that we should dismiss MMC's petition for review because it does not meet applicable procedural requirements. We agree that there are a number of deficiencies in the petition MMC has filed with this Court. Nonetheless, we exercise our discretion and elect to consider the merits of MMC's petition.¹

There is no need for us to summarize the evidence that supports the ALJ's determination that Frazier is 100% occupationally disabled. The Board has done that in a thorough, comprehensive opinion. Our function in reviewing the opinions of the Board is "[t]o correct the Board only where [we] perceive [that] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the

¹ See Smith v. Goodyear Tire and Rubber Co., Ky. App., 772 S.W.2d 640, 642 (1989) ("Dismissal of this action would therefore be appropriate only if the damage to those two objectives [deciding cases on the merits and preserving the right to appeal] were offset by some contribution to the achievement of an orderly appellate process").

evidence so flagrant as to cause gross injustice."² The Board's function is "to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result."³

In this case, the ALJ determined, from conflicting evidence, that Frazier was 100% permanently disabled. Because the ALJ's determination is supported by substantial evidence and the Board has not committed an error in assessing the evidence, neither erred.

Moreover, the ALJ was not required, as MMC argues, to use the American Medical Association's impairment ratings for finding Frazier permanently totally disabled. KRS 342.730(1)(b)⁴ requires

² Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

³ Id.

⁴ KRS 342.730(1)(b) provides that income benefits for disability shall be paid to the employee:

For permanent partial disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by the permanent impairment rating caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, times the factor set forth in the table that follows: [table omitted].

Any temporary total disability period within the maximum period for permanent, partial disability benefits shall extend the maximum period but shall not make payable a weekly benefit exceeding that determined in subsection (1)(a) of this section. Notwithstanding any section of this chapter to the contrary, there shall be no minimum weekly income benefit for permanent partial disability and medical benefits shall be paid for the duration of the disability.

that income benefits shall be paid for permanent partial disability based in part on AMA impairment ratings. KRS 342.730(1)(a),⁵ which applies to temporary or permanent total disability payments, does not utilize the AMA impairment ratings. The Board did not misconstrue these statutes.

Kentucky Revised Statute (KRS) 342.120(2) provides that:
The special fund shall have no liability upon any claim in which the injury occurred, or for cumulative trauma, the disability became manifest, or, for occupational disease, if the date of injury or last exposure occurred, after December 12, 1996.

Frazier was partially permanently disabled from the 1996 injury and totally disabled from a combination of the 1996 and 1997 injuries. Because Frazier was not totally disabled prior to December 12, 1996, the Board did not err in reversing the ALJ's award apportioning liability to the Special Fund beyond 425 weeks. After the Special Fund's overlapping PPD obligation ends, MMC will be solely responsible for the payment of Frazier's total occupational disability benefits for so long as he remains disabled.

⁵ KRS 342.730(1)(a) provides:

For temporary or permanent total disability, sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability. Nonwork-related impairment and conditions compensable under KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection.

The Board's decision is affirmed.

ALL CONCUR.

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